

(1945) 04 PAT CK 0015

In the Patna High Court

Ramchandra Singh and Others

APPELLANT

Vs

Mt. Bibi Khodaijaiul Kubra and Others

RESPONDENT

Date of Decision : 27-04-1945

Acts Referred:

Limitation Act, 1963 — Article 11, 14

Citation : AIR 1945 Patna 369

Hon'ble Judges : Sinha, J;Pande, J

Bench : Full Bench

Judgement

Sinha, J.—This is a plaintiffs" appeal from the decision of the learned Additional Subordinate Judge of Gaya, dismissing their suit for a declaration that the plaint properties belong to them, and that the pro forma defendants (defendants 7 to 9) have no interest therein and, finally, that the order of attachment after dismissal of the plaintiffs" claim under Order 21, Rule 58, Civil P. C, was illegal and inoperative. There was also a prayer for a permanent injunction against the principal defendants, restraining them from getting the properties sold in Execution Case No. 19 of 1938.

2. The plaintiffs instituted the suit on the following allegations : The plaintiffs are related to defendant 7 who is their sister"s husband. The plaintiffs "advisedly" executed two sale deeds, dated 18th September 1925, and 19th August 1930, in respect of the properties described in the schedule attached to the plaint. Those deeds were mere benami transactions, and, therefore, no consideration passed therefor. The principal defendants had a decree against the pro forma defendants, and they put the same into execution which was numbered as Execution case No. 19 of 1938 in the Court of the 3rd Subordinate Judge at Gaya. The decree-holders aforesaid got the properties in suit attached and prayed for their sale for realization of the decree against the pro forma defendants. The plaintiffs preferred an objection under Order 21, Rule 58, Civil P. C, which was registered as Misc. Case No. 65 of 1938 and was ultimately dismissed on 22nd September 1938. Being aggrieved by the said order of

dismissal of their claim case, the plaintiffs instituted the suit for the reliefs aforesaid.

3. The suit was contested by the principal defendants who denied that the sale deeds aforesaid in favour of their judgment-debtors were benami transactions. On the other hand, the defendants contended that they were real transactions for good consideration followed by possession in favour of the pro forma defendants. They also alleged that the pro forma defendants were in collusion with the plaintiffs who filed the objection under Order 21, Rule 58 on wrong and false allegations in which case defendant 7 stated that a deed of relinquishment in respect of the said properties had been executed by him. It was finally contended that the decision in the claim case was correctly given after taking oral and documentary evidence. The defendants also pleaded that the suit was barred by limitation.

4. The plea of limitation was raised in the following way : The suit under Order 21, Rule 63, Civil P. C, had been filed in the Munsif's Court on 17th November 1938, that is, within two months of the adverse decision in the claim case. In the Munsif's Court the defendants pleaded that the suit had been undervalued and that really it was beyond the pecuniary jurisdiction of the Munsif's Court. Ultimately, the plaint was, returned by the Munsif's Court on 14th February 1941, to be presented to the proper Court, as according to the Munsif's finding, the suit related to properties worth Rs. 13,000. Accordingly, the plaint was returned and was filed in the Court of the Subordinate Judge on that very day. The defendants, therefore, contended that the suit should have been filed within a year of the adverse decision in the claim case in the Subordinate Judge's Court. But, as the suit was filed deliberately in a Court which had no pecuniary jurisdiction to entertain it, it was barred by one year's rule of limitation.

5. The parties joined issue principally on two questions, namely, (1) whether the plaintiffs were the real owners of the properties, the pro forma defendants being their mere farzi-dars, and (2) whether the suit was barred by limitation under Article 11, Limitation Act. The, trial Court dismissed the suit, holding that it was barred by one year's rule of limitation, though on the question of title and possession it recorded a finding in favour of the plaintiffs. Hence this appeal by the plaintiffs.

6. In this Court Mr. Lal Narayan Sinha appearing on behalf of the appellants has contended that the judgment of the learned Subordinate Judge under appeal is substantially correct both on the question of title and possession as also of limitation. But" he has contended that the Court below proceeded to decide the case entirely ignoring the petition on behalf of the contesting defendants filed on 26th January 1943, which is to the following effect:

In the above suit today is the date fixed for hearing but the said suit cannot proceed in law because Execution Case No. 19 of 1938 in the 3rd Court of the Sub-Judge in which the plaintiff filed objection under Order 21 Rule 58 was

dismissed and so the plaintiff has instituted this suit under Order 21, Rule 63; but as the said Execution Case No. 19 of 1938 was dismissed the plaintiff has got no cause of action for this suit. Hence the entire record of Execution Case No. 19 of 1938 in the 3rd Court of the Sub-Judge, Gaya, may be sent for from the record room, so that the grievances may be redressed (Execution Case No. 19 of 1938 in the 3rd Court of the Sub-Judge, Gaya, disposed of on 3rd October 1939).

Petition of Mt. Bibi Khodijatul Kubra and Ors. opposite-party.

7. It is a fact that the learned Subordinate Judge has not referred to that petition in his judgment. The Court below has proceeded to decide the question of limitation in the following way : It has held that the plaintiffs are not entitled to the benefit of Section 14, Limitation Act, because they deliberately undervalued their plaint which was filed in the Munsif's Court. Hence, it was of the opinion that it cannot be said that the plaintiffs have been prosecuting their suit bona fide and with due diligence in the Munsif's Court, as required by the provisions of Section 14 of the Act. The Court below has relied upon the observations of their Lordships of the Judicial Committee in *Ramdutt Ram kissen Dass v. E. D. Sassoon & Co.* AIR 1929 P. C. 103. In that case their Lordships have laid down that where a suit has been instituted in a Court which is found to have no jurisdiction and it is found necessary to raise a second suit in a Court of proper jurisdiction, the second suit cannot be regarded as a continuation of the first, even though the subject-matter and the parties to the suits were identical. In that case their Lordships were not considering the case of two suits, but of two arbitration proceedings. But their Lordships' judgment proceeds on the analogy of the arbitration proceedings to suits. Hence, those observations of their Lordships are quite pertinent to the question in controversy in the present case.

8. The decision of this Court which was given by Sir Dawson-Miller, C. J. and Poster J., in *Bibi Sairah v. Mt. Golab Kuar* A. I. R. 1919 Pat. 345 is exactly in point. In that case also the suit had been filed in the Court of a Munsif on a valuation which was found to be a gross under-statement of the value of the property. The suit was ultimately filed in the Court of the Subordinate Judge on a proper valuation. Their Lordships decided that the time spent in prosecuting the suit in the Court which had no pecuniary jurisdiction over the subject-matter could not, u/s 14, Limitation Act, be allowed in computing the period of limitation for a suit under Order 21, Rule 63, Civil P. C. Belying upon this decision, I must hold that the time spent in prosecuting the suit in the Munsif's Court could not be allowed in computing the period of limitation for filing the suit. It must be held, therefore, that the filing of the suit in the Munsif's Court does not avail the plaintiffs in the present case. Hence, the suit treated as one under Order 21, Rule 63, Civil P. C, must be held to be barred by time. But Mr. Lal Nara-yan Sinha argued vehemently that the position in law as admitted by the contesting defendants themselves in their application of 26th January 1943, quoted above, makes Article 11, Limitation Act, inapplicable to the present case. He contends that Execution Case No. 19 of 1938 became infructuous on 3rd October 1939,

when it stood dismissed for non-prosecution, with the result that the order of dismissal of the claim case also became inoperative and that the plaintiffs' present suit should be treated as one simply for a declaration of their title on a cloud being thrown on their title to the property. In other words, he contended that the present suit is no more one under the provisions of Rule 63 of Order 21, Civil P.C. but simply a declaratory suit governed by the ordinary rule of limitation, namely, six years from the date of the cause of action. He strongly relied upon the observations of Sir George Bankin in *Najimunnessa Bibi Vs. Nacharaddin Sardar*, to the following effect:

The principle is that the object of making a claim in execution is to remove the attachment, that when the attachment is withdrawn that object is gained, and that, if there exists no attachment or proceeding in execution on which the order in the claim case can take effect, one is not bound to bring a suit complaining of such order.

9. The learned Judge in that case quoted with approval the following observations of Sir Charles Sargent in *Gopal Purshottam v. Bai Divali* 18 Bom.241:

We agree with the lower appeal Court that, when the plaintiff withdrew his attachment, the parties were restored to the status quo ante. The object of the claim which was preferred by the defendant was, as contemplated by Section 278, Civil P. C, to obtain the removal of the attachment, and when that attachment was removed by the judgment-creditor's own act on 20th November 1888, there was no longer an attachment or any other proceedings in execution on which the order could operate to the prejudice of the claimant and, therefore, no necessity for bringing a suit to set aside the order.

10. The other Judge, who was a party to the decision in *Najimunnessa Bibi Vs. Nacharaddin Sardar*, made the following observations:

Whether the decree is satisfied, or set aside, or reversed, or whether the decretal amount is paid into Court under Rule 55, or whether the attachment is voluntarily withdrawn by the decree-holder, or whether the order of attachment is discharged, in my opinion, the same result follows, namely, the parties are put back in the same position as they were in before the execution proceedings were launched.

11. Certainly these are very strong observations in favour of the appellants; but those observations were made in a case where, after the claim case had been dismissed for default, the execution proceedings came to an end within a year of the adverse order in the claim case. It was contended on behalf of the appellants that that does not make any difference. But the learned Counsel for the appellants was not able to. produce before us any decision where it had been laid down that the same is the position where the execution proceedings terminate more than a year after the decision in the claim case. Very great reliance was also placed by the appellants on the Full Bench decision of the Allahabad High

Court in *Habib Ullah and Another Vs. Mahmood and Others* which is to the same effect as the decision of the Calcutta High Court in *Najimunnessa Bibi Vs. Nacharaddin Sardar*, . But in this case also the execution proceedings had terminated within a year, of the adverse order in the claim case. Sir Shah Muhammad Sulaiman C. J. has made certain observations in his judgment which lend some support to the appellants.

12. On looking into the various decisions dealing with the question of limitation under Article 11, Limitation Act, relating to a suit under Order 21 Rule 63, Civil P. C, I find that the decision of a Division Bench of the Calcutta High Court in *Bamapada Bandopadhyaya v. Ramanath Mandal* 40 C. W. N. 146 is the nearest to the case before us. The headnote of the case correctly summarizes the decision in that case which is to the effect that the conclusiveness of an order in a claim case contemplated by Order 21 Rule 63, Civil P. C, is conditional on the continuance of the execution proceedings and the attachment issuing therefrom, and that consequently when an order is made on an application under Order 21 Rule 58 of the Code dismissing a claim but the sale itself held in that execution proceeding is set aside and the attachment ipso facto comes to an end, a subsequent suit brought beyond one year by the claimant for a declaration of his title is not barred under Article 11, Schedule 1, Limitation Act. It was held that it was immaterial that the execution proceedings came to an end within or beyond one year of the date of the order in the claim case. In that case the observations of Ramesam J. in *Kumara Goundan v. Thevaraya Beddi* AIR 1925 Mad. 1113, which are in these terms, have been quoted with approval:

if the operation of an order on a claim petition is to be regarded as conditional on the continuance of the attachment, it is difficult to see why the cessation of attachment within one year should destroy the operations and cessation of it beyond one year should have just the opposite effect merely because a suit to set aside could not be brought more than one year after the date of the order. It seems to me to be a novel legal conception.

13. The Division Bench of the Madras High Court in the case referred to above has reviewed the cases bearing on the point and has come to the conclusion that after a claim petition has been dismissed, and the attachment in respect of which the claim petition was made ceases, the claimant's failure to bring a suit within one year of the adverse decision does not preclude him from raising the question of title afterwards. Hence, the two decisions one of the Calcutta High Court and the earlier one of the Madras High Court are authorities for the proposition for which the appellants have been contending in this case. This proposition has not been laid down in express terms by the earlier decisions of the Calcutta, Allahabad and Bombay High Courts referred to above; but the observations made in those cases lend support to it. In this connexion reference may also be made to a decision of a Division Bench of the Allahabad High Court in *Onkar Prasad Vs. Dhani Ram and Others* . Their Lordships have laid down in that case that the suit contemplated by Rule 63 of o. 21, Civil P. C, is one in which the right of the

decree-holder to attach the property in question in execution of his decree is contested, and that, as soon as his decree is otherwise satisfied, or the attachment is withdrawn as a consequence of the decree-holder's act, the cause of action for the suit of the nature contemplated by Order 21 Rule 63 of the Code, to which Article 11, Limitation Act, applies, disappears. Hence, in a subsequent suit which may be brought by the claimant against a third person, even though he may be the judgment-debtor whose property it was alleged by the decree-holder to be, the cause of action is altogether different from the cause of action which he had alleged against the attaching creditor in his suit under Order 21 Rule 63 of the Code, and the later suit is governed by the usual twelve years' rule, and not by Article 11, Limitation Act. Though this decision is not on all fours with the facts of the present case", the principle governing the two cases is the same, namely, that the effect of the decision in the claim case disappears with the dismissal of the execution proceedings in which the attachment had been made leading up to the claim case. As already indicated, whether the decree is otherwise satisfied or the attachment is withdrawn as a result of the decree-holder's default in proceeding with the execution case, the order in the claim case shares the same fate as the execution case itself. The decision in the claim case is based primarily on a consideration of the decision of possession, and not on a Question of title. On the other hand, the decision in the suit has to proceed primarily on the question of title, and the question of possession is only ancillary to the main question. Therefore, the scope of the decision in the claim case and in the subsequent title suit is not the same. The decision in the claim case is not *res judicata* against the unsuccessful claimant on the question of title in a subsequent suit, though the shorter period of one year's limitation has been prescribed by the statute with a view to expeditious decision of the questions raised during the execution stage so that the execution proceedings may not be unduly delayed.

14. As a result of all these considerations, it must be held that this suit viewed as one for a mere declaration of title in favour of the plaintiffs is not barred by one year's rule of limitation. The appeal is accordingly allowed, but without costs, inasmuch as the point raised in this Court had not been specifically raised by the plaintiff-appellants in the Court below, and that is the point on which the appeal has succeeded in this Court. The judgment and decree passed by the Court below are accordingly set aside, and the plaintiffs declared to be entitled to the properties in suit. Each party will bear its own costs here and in the Court below, in view of the fact that the plaintiffs themselves were to blame for the delay in the institution of the suit.

Pande, J.

15. The question for determination is whether having regard to the provisions of Rule 63 of Order 21 and Article 11 of Schedule 1, Limitation Act, 1908, the appellants' suit which was brought more than a year after the claim had been dismissed is maintainable. The answer to the question depends upon the

operative effect of the order disallowing the claim on the dismissal of the execution proceedings. Rule 57 of Order 21, Civil P. C, provides that upon the dismissal of the application for execution the attachment shall cease. If on the dismissal of the execution, the orders disallowing the claim case ceased to be operative, the suit is maintainable. But if the order still continues to be in force then the suit is not maintainable. The attachment of a property in the execution of a decree is the cause for preferring claim by a person interested in the property. The effect of disallowing the claim under Rule 58 of the Code, is continuance of the attachment and liability of the property to be sold for satisfaction of the decretal dues. The summary decision in the claim case is the cause of action for suit u/s 63. In *Phul Kumari v. Ghanshyam Misra* 35 Cal 202, Lord Robertson who delivered the judgment of the Judicial Committee of the Privy Council pointed out that in a suit under Rule 63 "the plaint is for review of the summary decision." And in fact, though not in form, the suit is to alter or set aside the summary decision in the claim case. In *Sardhari Lal v Ambika Pershad* 15 Cal. 521 Lord Hobhouse observed:

The order is not conclusive; a suit may be brought to claim the property, notwithstanding the order but then the law of Limitation says that the plaintiff must be prompt in bringing his suit. The policy of the Act evidently is to secure the speedy settlement of questions of title at execution sales, and for that reason a year is fixed as the time within which the suit must be brought.

16. The object of a claim preferred under Rule 58 is to obtain release of the property from attachment. The immediate object of establishing right to the property by suit under Rule 63 also is to obtain its release from attachment. There is, however, difference in the scope of investigation of a claim under Rule 58 and that of a suit under Rule 63. In a claim under Rule 58, the scope of enquiry being confined, provision is made for investigation of it in a limited fashion. Rs. 60 and 61 provide for a summary investigation into possession as distinct from a thorough trial of right to the property. In a suit under Rule 63, the enquiry into the rights of the parties to the property is not subject to any limitation. Both parties to the suit may thoroughly thrash out the question of right to the property. In either case the material point is the attachment of the property. And the ultimate object of both is to obtain release of the property from attachment. Where after an order disallowing a claimant's claim and directing the attachment to continue the attachment is removed within one year from the date of the order, the order loses its force, as if no order was made, so far as the parties are concerned. If a fresh attachment is made it is open to the claimant to prefer a fresh claim. And, in the event of the claim being again disallowed, fresh cause of action arises for a suit under Rule 63. It follows that on the removal of attachment the parties are put back in the position they stood before the order in the claim case, or as has been put in some of the reported cases, "status quo ante" is restored. In *Najimunnessa Bibi Vs. Nacharaddin Sardar*, his Lordship, Bankin J., explained the effect of removal of attachment in regard to a suit under Rule 63 thus:

The principle is that the object of making a claim in execution is to remove the attachment, that when the attachment is withdrawn the object is gained, and that, if there exists no attachment or proceeding in execution on which the order in the claim case can take effect, one is not bound to bring a suit complaining of such order.

17. This view is supported by several reported decisions of different High Courts in the following cases: Ibrahim v. Kabulabhai 13 Bom. 72, Gopal Purshottam v. Bai Divali 18 Bom.241, Krishna Prosad Roy v. Bepin Behary Roy 31 Cal. 228, Bamapada Bandopadhyaya v. Ramanath Mandal 40 C. W. N. 146, Kumara Goundan v. Thevaraya Beddi AIR 1925 Mad. 1113 and Onkar Prasad Vs. Dhani Ram and Others . In the present case the claim was disallowed on 22nd September 1938. The appellants instituted a suit on 17th November 1938 in the Munsif's Court against that order. The plaint was returned on 14th February 1941 as the Munsif had not the necessary pecuniary jurisdiction to decide the suit. The plaint was then presented in the Court of the Subordinate Judge on the very day it was returned. The suit was instituted in the Subordinate Judge's Court beyond the prescribed time for a suit to set aside summary decision in the claim case. But the application for execution was dismissed on 3rd October 1939 and the attachment then ceased. With the removal of the attachment the order disallowing the claim also lapsed. Therefore the present suit, if otherwise maintainable, is not affected by Article 11 of Schedule 1, Limitation Act. The circumstances of the present suit appear to be similar to that in 51 Cal. 5483 referred to above. In that case Najimunnessa Bibi's property was attached on 4th November 1910. Her claim was dismissed for default on 7th January 1911. The application for execution was dismissed very soon afterwards for default. In a subsequent execution proceeding the property was sold and brought by the judgment creditors at the execution sale in, the year 1918. She instituted a suit in 1918 for confirmation of her possession and for injunction. It was contended that the suit was barred by limitation. By concurrent judgments a Division Bench of the Calcutta High Court (Rankin and Page JJ.) held that it not being a suit under Order 21 Rule 63, Civil P. C, Article 11, Limitation Act, did not apply. In the circumstances discussed I am of the opinion that Article 11 of Schedule 1, Limitation Act, has no application to the present case.

18. There is a further point which, in my opinion, seems to require consideration. The suit was originally framed as one under Order 21 Rule 63, Civil P. C. The plaint being returned by the Munsif was presented in the Court of the Subordinate Judge in its original form. A question now arises whether on such a plaint the appellants are entitled to relief u/s 42, Specific Relief Act. In the plaint the cause of action is said to arise on the day when the attachment took place as also on 22nd September 1939, when the claim under Rule 58 was disallowed. On the dismissal of the execution case the attachment ceased and consequently that cause of action disappeared. But the other cause of action which cast a cloud upon the appellants' title to the property will exist. And as the property is still liable to attachment in execution of the respondents' decree, as also in decrees

of other judgment-creditors, if any, against the pro forma defendants, the appellants have sufficient cause of action to seek a declaration of their title to the property. In a similar circumstance it was held in *Jamna Bai v. Dattatraya Ramchandra A. I. R. 1936 Bom. 160* that a suit u/s 42, Specific Relief Act, is competent. In that case the property stood in "the name of the wife of the judgment-debtor. In a decree against the husband the property was attached. The wife objected to the attachment under Rule 58. The judgment creditor thereupon withdrew the attachment and sued for a declaration that the property in dispute though purchased in the name of the wife was really owned by the husband and was liable to attachment and sale in execution of the decree against him. It was contended that Order 21 Rule 63 precluded all suits but one under the rule itself and therefore no suit could lie u/s 42, Specific Relief Act. His Lordship Beaumont C. J. referring to Rule 63 observed:

That rule would have applied if the plaintiff had not withdrawn his attachment and an order had been made against him dismissing his attachment. But as that course was not adopted, I agree with the lower Courts that the case does not fall within Order 21, Rule 63 Civil P. C.

19. It was held that if a declaration is to be made, Section 42, Specific Relief Act, gives the right to obtain the declaratory order. In the present case the attachment having ceased "on dismissal of the application for execution, the terms of Order 21 Rule 63 do not apply. Therefore, the only appropriate course for the appellants to seek declaration of their title to the property is by a suit u/s 42, Specific Relief Act. It is true that the suit was not actually so framed. But the form of the plaint does not seem to me to present any serious difficulty in granting the relief to which the appellants seem entitled. An amendment of the plaint by deletion of relief No. 2 and the portion relating to attachment in relief No. 1, and perhaps some minor alteration, not very material, would make the plaint quite consistent with the form of a suit u/s 42, Specific Relief Act. If the appellants had sought leave of the Court for such amendment either in the lower Court or in this Court, it would have been readily granted. In *Ma Shwe Mya v. Maung Mo Hnaung A. I. R 1922 P. C. 249*. Lord Buckmaster who delivered the judgment of the Board observed:

All rules of Court are nothing but provisions intended to secure the proper administration of justice, and it is therefore essential that they should be made to serve and be subordinate to that purpose, so that full powers of amendment must be enjoyed and should always be liberally exercised, but nonetheless no power has yet been given to enable one distinct cause of action to be substituted for another, nor to change, by means of amendment, the subject-matter of the suit.

20. In the present case there is no variation in the cause of action, or the subject-matter of the suit. Therefore the limitation on the powers of the Court in granting leave to amend the plaint does not apply here. But as no prayer for amendment of the plaint was made, the reliefs which, in the altered circumstances, have

become redundant, may easily be ignored. It is the duty of the Court to take notice of altered circumstances in order to shorten litigation and to do complete justice between the parties and to mould its decree according to the circumstances as they stand at the time the decree is made: Noori Mian v. Ambika Singh A. I. R. 1917 Cal. 716. I agree that the appeal should be allowed.